STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 4, 2002
v JOSHUA ALLEN MCDONALD, Defendant-Appellee.	No. 233812 Oakland Circuit Court LC No. 00-174377-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v CHRISTOPHER MCDONALD, Defendant-Appellee.	No. 234143 Oakland Circuit Court LC No. 00-174634-FH

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

The people appeal as of right an order of the circuit court granting defendants' motions to suppress and for dismissal. We affirm.

Defendants were charged with possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), after the police seized a "brick" of marijuana discovered during a patdown search of a jacket. We find no clear error in the trial court's ruling suppressing the marijuana evidence.

The prosecution argues that the trial court erred as a matter of law when it suppressed the marijuana found in Joshua McDonald's jacket because the search was a valid search incident to his lawful arrest. We review de novo a trial court's decision on a motion to suppress regarding its interpretations of the law. *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999). We review the trial court's factual findings made in connection with a motion to suppress for clear error. *People v Eaton*, 241 Mich App 459, 461; 617 NW2d 363 (2000).

A defendant has the right to be secure from unreasonable searches and seizures under both the state and federal constitutions. US Const, Am IV; Const 1963, art 1, § 11; *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000). The purpose of the Fourth Amendment is to protect citizens from unreasonable searches and seizures. *People v Stevens (After Remand)*, 460 Mich 626, 634-635; 597 NW2d 53 (1999). In order to protect a person's rights from unreasonable searches and seizures, the police must show that they either had a warrant, or that their conduct fell within an exception to the warrant requirement. *Eaton*, *supra*, p 461.

In this case, the officers did not have a search warrant and it is questionable whether they had probable cause to obtain one.[1] All they knew for sure was that there was an outstanding bench warrant for Joshua's arrest and that the victim of a breaking and entering suspected that the McDonald brothers might have been involved.

Warrantless searches are per se unreasonable under the Fourth Amendment, subject to a few specifically delineated and well-established exceptions, including (1) searches incident to an arrest, (2) automobile searches and seizures, (3) plain view seizure, (4) consent, (5) stop and frisk, and (6) exigent circumstances. *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993).

The prosecution's main argument is that the warrantless search fit into the search incident to arrest exception. Additionally, the prosecution seems to argue undertones of a "protective sweep" for officer safety. When an arrestee is taken into physical custody pursuant to a lawful arrest, it is reasonable for the police to search him for "weapons, instruments of escape, and evidence of crime." *People v Houstina*, 216 Mich App 70, 75; 549 NW2d 11 (1996). Further, the police may search the area within the arrestee's immediate reach. The search may occur at the place of arrest or at a place where the arrestee is detained. *Id*. The area within the arrestee's immediate control is defined as "the area from which the arrestee might gain possession of a weapon or destructible evidence." *People v Jackson*, 123 Mich App 423, 429; 332 NW2d 564 (1983), citing *Chimel v California*, 395 US 752, 763; 89 S Ct 2034; 23 L Ed 2d 685 (1969). However, "[t]he scope of the search must be strictly tied to, and justified by, the circumstances that rendered its initiation permissible." *Houstina, supra*, p 75.

Trooper Radke and two other officers entered Velma Denison's home, with her permission, looking for defendants. They were responding to a complaint from James Crawford who believed that defendants broke into his home and stole his gun[2]. Radke was also aware that there was an outstanding arrest warrant for the arrest of Joshua for escape from a children's detention center. After gaining access to the front room of the home, they identified Joshua, who was sleeping in a reclining chair. The officers woke him up, handcuffed him, and immediately placed him under arrest. Joshua's arrest was lawful as it was pursuant to a valid arrest warrant.

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[1] On cross-examination during the evidentiary hearing, Trooper Radke testified that neither defendant was arrested for the breaking and entering being investigated. He was then asked if he had probable cause to arrest defendants on that charge to which he replied, "Probably not."

[2] Crawford understandably did not mention that a brick of marijuana was also missing.

As this was occurring, two other young men who had also been asleep in the room woke up and were standing on the far side of the room in front of a couch. One of the young men was Christopher, Joshua's brother, and the other was Duane Jensen. With the situation in hand, a review of the record reveals that the officers then took the liberty of performing a thorough search of the front room of the home. This search included three jackets that hung on a coat rack that was not in reach of Joshua or any of the other young men at the time Joshua was arrested. The coat rack was mounted to the wall approximately three feet away from Joshua who was already handcuffed and in custody[3]. Prior to searching the jackets, Radke did not ask Joshua if he was the owner of the jacket or which jacket was his.

The scope of the search was not "strictly tied to, and justified by, the circumstances that rendered its initiation permissible." *Id.* We agree with the conclusion of the trial judge who, after hearing the testimony at the evidentiary hearing held that even though the trooper testified that the reason he was looking at the jackets was to give one to Joshua to wear on a cold winter day, the search of the jackets was part of an impermissible general search of the premises looking for the missing handgun.

The jackets were not in the immediate reach of Joshua, the arrestee, or Christopher or Duane. The jacket was not Joshua's property, and in fact, the officer was not even under the impression that the jacket belonged to Joshua when the search occurred. Radke did not ask the young men about the jackets until after he discovered the contraband that later became the basis for the charges in the instant case. We conclude that the trial court's finding, that "after the arrest and handcuffing of Joshua, that there's no way that the jacket in question or the jackets in question would have been searched incident to arrest," is not error. *Zahn, supra*, p 445. Under all of the circumstances, *New York v Belton*, 453 US 454, 457; 101 S Ct 2860; 69 L Ed 2d 768 (1981), relied on by the dissent is distinguishable on its facts and inapplicable here.

We also find that the three cases the prosecution cites in support of its proposition that the search here fits within the search incident to arrest exception, *Houstina, supra*, *People v Crawford*, 202 Mich App 537; 509 NW2d 519 (1993), and *Jackson, supra*, are distinguishable. In *Houstina*, *supra*, and *Crawford*, *supra*, the searches of the defendant's property were both performed after the defendants were in custody, and the searches were more akin to inventory searches, another exception to the search warrant requirement. *Houstina*, *supra*, pp 72-77; *Crawford*, *supra*, pp 538-539. In *Jackson*, *supra*, pp 425-429, the police searched a man's canvas handbag incident to his lawful arrest. The defendant was actually carrying the handbag when he was arrested. In that case, the handbag was his property and was obviously under his control. Here, it was not known if the jacket belonged to Joshua, and the jacket was not within his immediate reach. Therefore, we do not find the cases cited in support of the prosecution's

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[3] The dissenting opinion asserts that the jackets were in an area that was "within the immediate control" of the arrestee. The record does not support this interpretation of the facts. Trooper Radke testified that when the jackets were searched Joshua was already under arrest and handcuffed. On questioning from the trial judge, Trooper Radke did not disagree that he knew that the area where the jackets were hanging "was not in his [Joshua's] immediate control area."

argument persuasive. As such, the warrantless search does not fit within the search incident to arrest exception. *Houstina, supra,* p 75.

The officer safety argument is also worth brief discussion. This issue is passively underscored by the prosecution in its argument. The prosecution states the appropriate inquiry in this case is "an objective test based on proximity in time and space of the search to the arrest, rather than a subjective test based on an appellate court's appraisal of the likelihood that defendant posed a danger to officers." *Jackson, supra,* p 429. The Fourth Amendment permits the police to conduct a "limited protective sweep" of a residence in connection with an arrest within that residence, if they reasonably believe that someone in the house poses a danger. *People v Beuschlein*, 245 Mich App 744, 757; 630 NW2d 921 (2001). "Such a search is quick and limited, and conducted for the sole purpose of ensuring the safety of police officers and other persons." *Id*. In that case, at the time the police entered the defendant's residence, they were responding to a domestic disturbance complaint, and they did not know the number of people in the residence or if anyone was in danger. When conducting the protective sweep, the police discovered crack cocaine in plain view. This Court held that the police properly conducted a protective search of the residence, and the crack cocaine was properly seized. *Id*., pp 757-758. Here, the police were not responding to a complaint from that residence, but rather, they were looking for someone specific on an unrelated matter, whom they found almost immediately upon entering the residence. Radke admitted that the officers' search had been a thorough search of the living room, and that the officers may even have searched under couches, in end tables, and drawers in the room. The officers also searched all three young men and their immediate area. The facts show that the search was not quick and limited, or specifically for the purposes of officer safety. Because this is the case, the search does not qualify as a "limited protective sweep," and is not exempt from Fourth Amendment protections. *Id*., p 757.

Affirmed.

/s/ Janet T. Neff
/s/ Michael J. Talbot